

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PATRICK FLANAGAN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
PH07529110029

DATE: JUN 07 1991

Patrick Flanagan, Neptune City, New Jersey, pro se.

Captain Andrew Ruymann, Fort Monmouth, New Jersey, for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petition for failure to meet the Board's criteria for review. See 5 C.F.R. § 1201.115. However, we REOPEN the case on the Board's own motion under 5 C.F.R. § 1201.117 and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

The appellant filed an appeal with the Board's Philadelphia Regional Office alleging that his September 22, 1990, retirement from his position as GS-12 Personnel Management Specialist was coerced and, therefore, involuntary. Specifically, the appellant asserted that his supervisor, Mr. Steiger, deliberately harassed him at work and treated him unfairly.¹ The appellant further asserted that Mr. Steiger's poor treatment of another employee in the office convinced him that Mr. Steiger's unfair treatment against him would continue indefinitely, and left him no other option but to retire. See Appeal File, Tab 1.

The parties agreed that the appellant had raised a colorable claim of coerced retirement, warranting a hearing which the administrative judge duly convened. *Id.* at Tabs 6 and 7. Thereafter, the administrative judge issued an initial decision in which, after examining the evidence, she concluded that, while the appellant and Mr. Steiger had a poor working relationship, the latter's conduct toward the appellant was not so coercive as to make his working environment

¹ The appellant's decision to retire was prompted by a verbal confrontation that he had with Mr. Steiger, following which the appellant went to the medical unit to be examined by the staff nurse. Later that day, he left work and remained at home for three days. When he returned, he was charged absent without leave (AWOL) for the hours of work he had missed. He retired a week later, but before he did, he grieved the AWOL assessment and was later successful in having those hours changed to sick leave. See Agency File, Tab 4d.

intolerable, as he claimed. See Initial Decision (I.D.) at 4-11. The administrative judge further found that, although the absent without leave (AWOL) assessment was not upheld in the grievance process, the agency's decision to charge the appellant AWOL was not intimidating to the point that he had no choice but to retire, rather than live with the original AWOL assessment. *Id.* at 12. Thus, the administrative judge found that the appellant's retirement was voluntary, and she dismissed the appeal for lack of jurisdiction. *Id.* at 13.

ALLEGATIONS ON PETITION FOR REVIEW

In his petition for review, the appellant raises numerous objections to the way in which the administrative judge conducted the hearing, including her denying him certain witnesses and exhibits, and her permitting an agency witness to act as the agency's technical advisor. In addition, the appellant takes issue with the weight afforded by the administrative judge to certain of the testimony. See Petition for Review at 1-8.

ANALYSIS

The appellant first alleges that the administrative judge denied him two witnesses, Messrs. Dolezal and Kelly. As to Mr. Dolezal, the record reflects that the administrative judge approved him as a witness for the appellant. See Appeal File, Tab 13. Several weeks before the hearing, however, the agency representative advised the administrative judge that

Mr. Dolezal would not be able to appear on the assigned date. *Id.* at Tab 15. The parties agreed to take Mr. Dolezal's testimony one week after the hearing by means of a recorded conference call. *Id.* at Tab 16. During the hearing, the administrative judge asked the appellant if he still intended to take Mr. Dolezal's testimony in this fashion, and he replied that he did not. See Hearing Tape 2B. Having waived below the taking of Mr. Dolezal's testimony, the appellant cannot now raise this issue in his petition for review. See *Nestro v. U.S. Postal Service*, 34 M.S.P.R. 242, 245-46 (1987).

As to Mr. Kelly, the record reflects that the administrative judge denied him as a witness on the basis that his proposed testimony was irrelevant.² See Appeal File, Tab 13. The administrative judge allowed, however, that, if the appellant believed that Mr. Kelly's testimony had some supportive value for the testimony of other witnesses, he (the appellant) could submit a written statement from him. *Id.* The record does not reflect that the appellant did so. Thus, he cannot now be heard to complain. See *Nestro*, 34 M.S.P.R. at 245-46.

The appellant next objects to the fact that, after the testimony of agency witness, Mr. Gustafson, he was permitted to serve as technical advisor for the agency and be present during the remainder of the hearing. The appellant contends

² The appellant had proffered that Mr. Kelly would testify as to Mr. Steiger's allegedly unfair treatment of another employee in the office. See Appeal File, Tab 10.

that Mr. Gustafson intimidated his (the appellant's) witnesses. The record reflects that, when the agency representative explained his request to have Mr. Gustafson serve as technical advisor for the agency, the administrative judge asked the appellant if he had any objection, and he stated that he did not. The administrative judge then ruled that Mr. Gustafson could serve as agency technical advisor, once he had concluded his testimony. See Hearing Tape 1A. Under the circumstances, the appellant's failure to object below to the administrative judge's ruling in this regard precludes his doing so on petition for review. See *Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988).

Next, the appellant cites two specific objections to the way in which the administrative judge conducted the hearing. First, he contends that she advised him, prior to the hearing, that he could not refer to himself in the third person when he questioned witnesses, but that she later reversed her position on that matter, causing him confusion. Second, the appellant alleges that, at the hearing, he was seated furthest from the witnesses and was required by the administrative judge to remain seated during the questioning of witnesses.³ As to these matters, we note that the administrative judge has authority to regulate the course of the hearing. See 5 C.F.R. § 1201.41(b)(6). The appellant has not shown that the

³ The appellant does not suggest, however, that the administrative judge treated him differently from the agency representative in this regard. See Petition for Review at 4.

administrative judge abused her authority in this regard. Even if the administrative judge's conduct could be considered error, the appellant has shown no prejudice to his substantive rights. In the absence of prejudice, such errors are of no legal consequence. See *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights).

The appellant alleges that the administrative judge erred by denying him certain exhibits: A 1989 inspection report about the Personnel Directorate prepared by the Department of the Army and performance improvement plans initiated by Mr. Kelly with regard to two former employees. The record reflects that the parties reached stipulations as to these documents, see Hearing Tape 1A, thereby obviating the appellant's need to prove the facts alleged therein. See 5 C.F.R. § 1201.63. Having concurred in this method of production of evidence, the appellant cannot now be heard to complain that he was denied the opportunity to submit these documents into the record. See *Nestro*, 34 M.S.P.R. at 245-46.

The appellant contends that the administrative judge failed to consider certain testimony that he solicited on cross-examination of an agency witness, Mr. Kushiya, as to a grievance the appellant filed against Mr. Steiger prior to retiring. The administrative judge did, however, refer to this grievance in the initial decision. See I.D. at 3. The fact that she did not mention the particular testimony to

which the appellant refers does not mean that she did not consider it in reaching her decision. See *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986).

Next, the appellant alleges that the administrative judge attached too much significance to the testimonies of two agency witnesses, Ms. Taylor and Ms. Kapetanakis, regarding his poor performance. The appellant's contentions regarding the weight which the administrative judge gave to certain evidence and testimony constitute mere disagreement with her findings and, therefore, do not meet the criteria for review. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*).

Finally, the appellant objects to the way in which the agency representative questioned certain witnesses and, by implication, the administrative judge's permitting such questioning. Specifically, the appellant contends that it was improper for the agency representative to ask witnesses whether they had ever heard of Mr. Steiger hurting anyone. However, these questions were based on the appellant's statements that he feared a physical altercation with Mr. Steiger because of their escalating verbal conflicts. See Hearing Tape 2B. Under the circumstances, the administrative judge did not abuse her discretion in permitting the questioning. See 5 C.F.R. § 1201.41(b)(3) (administrative

judge has the authority to receive relevant evidence); *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985) (the administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).


NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.